Supreme Court, U.S.
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NO. 85 - 145

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

GENITH A. DOUGLAS,

Petitioner,

vs.

TRAVELERS INNS OF NORTH WILKESBORO, INC. d/b/a HOLIDAY INN OF WILKESBORO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

T. Paul Hendrick
Hamilton C. Horton, Jr.
Gray Robinson
HORTON HENDRICK & KUMMER
450 NBNC Plaza
Winston-Salem, NC 27101

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STATEMENT OF THE CASE

Respondent hereby incorporates by reference the entire Memorandum Opinion rendered by the District Court below as its statement of the case. The Memorandum Opinion is set forth at page 1a of Petition. Petitioner's statement of the facts and her discussion of the evidence is argumentative and completely ignores the findings of fact set forth by the District Court.

DISCUSSION

NO CONFLICT EXISTS BETWEEN THE CIRCUIT COURTS AS TO THE EMPLOYER'S BURDEN OF PROOF WITH RESPECT TO "UNDUE HARDSHIP" UNDER SECTION 701(j) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. Section 2000e-2(j)

This petition arises under Section 701(j) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e-2(j) (Section 701(j)), which states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business. (emphasis added)

The sole issue raised by the Pet-

itioner is the proper interpretation of what is an "undue hardship on the conduct of the employer's business" as is set forth in Section 701(j). Petitioner suggests a great rift between the Fourth Circuit and other circuits, arguing that the Fourth Circuit has contravened the obvious intent of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977) and that therefore, a Writ of Certiorari should be granted herein. (Petition pp 12, 16-41).

Respondent, after a careful review of the cases cited by Petitioner and later cases decided in the Circuit

Courts strongly contends that no such conflict exists and there are no grounds sufficient to warrant a Writ of Certiorari in this case.

In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977) this Court for the first time definitively interpreted the employer's responsibility to accommodate employees' religious beliefs under Section 701(j). This court indicated that, at that time, neither Congress nor the Equal Employment Opportunity Commission had defined "reasonable accommodation". Furthermore, this Court noted that two

Circuit courts, i.e., the Fifth and Sixth, had reached different results under similar circumstances. Hardison, 432 U.S. at 75, n. 10.

In order to set guidelines for future decisions this Court held that an employer need not (1) breach a collective bargaining agreement if no other accommodations were available nor (2) incur more than a de minimis cost in order to "reasonably accommodate" an employee. This Court stated:

> "To require [an Employer] to bear more than a de minimis cost in order to give Hardison Saturday off is an undue hardship"

432 U.S. at 84.

Petitioner proposes that a new standard must be set as to what is "de minimis cost". She has asserted that several circuits, i.e. Third, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits require evidence of actual, incurred, quantifiable costs in order to achieve the de minimis standard; whereas, the Fourth Circuit, according to Petitioner's forshortened version of the evidence in the instant case, only requires evidence of preceived or theoretical costs to establish undue hardship.

The uniform principle recognized

by Hardison and all Circuit Courts is that "reasonable accommodation" is a factual issue to be determined on a case by case basis and dependent on the unique circumstances of the individual employer - employee relationship. Hardison, 432 at 75, n. 10; Yott vs. North American Rockwell Corp., 602 F. 2d 904 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980); Nottelson vs. Smith Steelworkers, 643 F. 2d 445 (7th Cir. 1981); Redmond vs. GAF Corp., 574 F. 2d 897 (7th Cir. 1978). As we shall see from a review of the cases cited by Petitioner, and later cases found by Respondent, no actual conflict exists in the Circuit

Courts, but rather, these cases merely turn on their own particular facts.

(a) Fourth Circuit:

The Petitioner singles out the Fourth Circuit as the only Circuit which does not correctly interpret the Hardison opinion (Petition, pp. 12, 16-41). It cites two decision for this proposition, Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir 1977); and the opinions below. However, reference to the Jordan decision and the Memorandum Opinion rendered below illustrates the Fourth Circuit's careful

and reasoned adherence to the guidelines in Hardison.

(1) Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977). This case involved a unique factual situation in that plaintiff refused to allow the employer any chance to accommodate her religious beliefs. Jordan demanded an absolute guarantee from the defendant Bank that she would not work on her Sabbath, (from sundown Friday to sundown Saturday), before she would go to work for the defendant Bank. The defendant Bank was willing to accommodate and work with the defendant regarding her

beliefs but due to potential liability could not offer a naked guarantee. Jordan then sued for violation of her religious rights under 42 U.S.C. Section 2000e-2(a) and (j). The Court held that the defendant Bank was faced with an impossible and unreasonable condition which it could not accommodate even if it wanted to, and therefore no violation of Section 701(j) occurred. The court reasoned that Hardison did not stand for the proposition that an employer would have to make such a guarantee. See, Bhatia v. Chevron, USA, Inc. 734 F. 2d 1382 (9th Cir. 1984) (discussed below) for a similar result.

(2) Douglas v. Travelers Inns of North Wilkesboro, Inc., No. C-79-370-W (W.D.N.C. 1983), aff'd per curiam, No. 84-1071 (4th Cir. 1985) (attached as Appendix to Petition). As will be further discussed below, the Petitioner places the greatest emphasis in her argument of inter-circuit conflict upon the Memorandum Opinion rendered by the trial court below and affirmed by the Fourth Circuit. (Petition, pp. 5-9, 16-22, 28, 33-34, 38-40). This position is easily countered by reference to the findings of fact as discerned in the Memorandum Opinion.

While it should be noted in

passing that Petitioner's arguments would be better placed in her Brief on the Merits pursuant to Rule 34 of the Rules of this Court we must also note that the Petitioner completely ignores the findings of fact rendered by the trial court below and relies only on evidence which she feels is relevant to her case. In an effort to clarify the basis for the Fourth Circuit's opinion. Therefore, Respondent feels it must set out the actual findings of the trial court on this issue:

> "23. Ms. Douglas also claims that she was terminated from her position as cook because she was required to work on alternating Sundays, which was against her religious beliefs

because Sunday was the day of her religious observance. Ms. Douglas further contends that Travelers Inns did not attempt to accommodate her religious observances, and that she was discriminated against on the basis of her religion. Travelers Inns countered that Ms. Douglas did, in fact, agree to work at least two Sundays, and that upon learning of Ms. Douglas religious beliefs, Travelers Inns hired an additional cook to work alternate Sundays, and they made reasonable accommodations for such religious beliefs by attempting to find another cook so that Ms. Douglas could be excused from any Sunday labor. The events relative to this claim follow.

24. During the Spring of 1975, Innkeeper Kirkman was having problems structuring the work schedule of his staff in that he had recently lost a cook and a front desk employee, and the recently enacted Wage and Hour laws had limited his current staff to forty-four hours per week instead of the usual forty-eight hours per week. In an

effort to keep a full staff working during the seven days a week operation of the restaurant, Mr. Kirkman approached Ms. Douglas about preparing the noon buffet at the Travelers Inns on two consecutive Sundays until he could hire other cooks. Travelers Inns had not asked Ms. Douglas to work on Sundays for the past two and one-half years that she was employed at Travelers Inns. Ms. Douglas voiced her religious objection to working on Sunday to Mr. Kirkman, but nevertheless, she agreed to work on the two Sundays in order to get Mr. Kirkman "out of a bind."

25. In addition to Ms. Douglas, Travelers Inns also employed three other cooks at that time: Mr. Donald Champion, a part-time trainee, Ms. Blanche Soots, a second cook, and Mr. Dewey Blevins, a parttime trainee.

26. Innkeeper Kirkman did, in fact, hire one other cook, Ms. Louise Carson, to work on Sundays, but the shortage of first cooks made it necessary for Mr. Kirkman to ask Ms.

Douglas to work every other Sunday until another cook could be hired. When advised of this temporary arrangement, Ms. Douglas stated that she could not work on any more Sundays because of her religious beliefs. Mr. Kirkman responded that he had to have someone he could rely on because he was "in a bind," and that if she could bear with him one more week or so, he would hire another cook to work on Sundays. Ms. Douglas replied that she thought he had promised her that she would not have to work on week ends anymore because of the long hours she had been putting in. Mr. Kirkman then stated that working on alternate Sundays was the best that he could do at that time, and he told her she could either work on alternate Sundays, or "that's it." Ms. Douglas interpreted this conversation to mean that she was fired, and she left her job that same day on May 28, 1975. However, Ms. Douglas further testified by deposition that working on Sundays was only "part of it," and that she left partly because she was not made

kitchen supervisor."

The trial court in its opinion then found that Respondent did, in fact, make several good faith attempts to accommodate Petitioner and to force Petitioner to further efforts would impose "more than a de minimis cost", which Title VII does not require. Hardison, supra; Jordan, supra.

The court stated:

> A review of the evidence presented at trial shows that Travelers Inns did, in fact, make good faith efforts to reasonably accommodate Ms. Douglas' religious beliefs. Due to the recent loss and shortage of employees at Travelers Inns, the seven-day-a-week operation of the hotel and restaurant and the necessary compliance with the

recently-enacted wage and hour laws, Travelers Inns had to make accommodations with the available qualified personnel in order to make the shifts equal for all employees. As the only first cook available, Ms. Douglas initially agreed to this arrangement, and she voluntarily worked on two Sundays. In a further effort to accommodate Ms. Douglas, Travelers Inn hired another cook, Ms. Louise Carson, to work on alternate Sundays with Ms. Douglas until another cook could be hired to replace her. Despite this temporary restructuring of the work schedule, Ms. Douglas interpreted such arrangements to mean that she was discharged. In actuality, however, Travelers Inns was making a good faith effort to accommodate Ms. Douglas' religious beliefs, and her unreasonable interpretation of the accommodation process to mean that she was forced to resign finds no basis or support from the evidence. See Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977). See also Chrysler Corp. v. Mann, 561 F. 2d 1282 (8th Cir.

1977), cert. denied, 434 U.S. 1029 (1978).

Moreover, to require further accommodation action on the part of Travelers Inns would constitute an undue hardship on its business. Travelers Inns had satisfactorily shown that it attempted in good faith to make reasonable accommodations for Ms. Douglas' religious beliefs, even to the extent of hiring one and seeking another additional replacement cook, and further accommodation would create an undue hardship where limited numbers of employees at the plaintiff's position were available. See, Johnson v. U.S. Postal Service, 497 F. 2d 128 (5th Cir. 1974), Olds v. Tennessee Paper Mills, Inc. 11 FEP 350, 352 (E.D. Tenn, 1974), aff'd mem., 524 F. 2d 1405 (6th Cir. 1975); Dixon v. Omaha Public Power District, 385 F. Supp. 1382 (D.Neb. 1974). If Travelers Inns were required to strictly abide by the plaintiff's demands, it would create extra expense to accommodate not only Ms. Douglas, but any other employee who might be affected

by such a concession. And, where an accommodation would impose more than a de minimis cost in lost efficiency, or which would be an imposition on co-workers tantamount to reverse discrimination against them, an undue hardship would lie. Hardison, 432 U.S. at 78-85. Lastly, Travelers Inns' past practice of accommodating Ms. Douglas' religious beliefs for over two and one-half years further supports a finding of undue hardship where the evidence revealed that Ms. Douglas left her employment despite Travelers Inns' earnest efforts to locate another employee to excuse her from further Sunday labor. Id. at 68. See also Huston v. United Auto Workers, Local 93, 559 F. 2d 477 (8th Cir. 1977); Ferguson v. Kroger Co., 16 FEP 733 (S.E. Ohio 1978). It follows, therefore, that Ms. Douglas was not wrongfully discharged from her employment as stated in 42 U..C. Section 2000e-2 (a) (1).

Petition pp 40a-43a

(b) Other Circuits:

Comparing the approach taken by the district court below, and affirmed per curiam by the Fourth Circuit, to the decisions of the Third, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits leads one to the inescapable conclusion that all Circuits interpret the Hardison guidelines exactly the same way and that there is not, as Petitioner suggests, any conflict between the Federal Circuits.

Each case turns on its own facts and a factual finding by a trial court that "reasonable accommodation" has or has not been attempted

should not be overturned unless clearly erroneous. Hardison, supra; Yott, supra; Nottelson, supra.

A survey of the cases cited by Petitioner and several later cases indicates that the factual situations involved fall into two categories. First, the plaintiff refused to pay union dues or join a union due to conflicts with his or her religious beliefs. Second, the plaintiff refused to work certain hours which conflict with his or her religious beliefs.

The employee's actions in the first category uniformly is held to

be protected under Section 701(j) of Title VII. In these cases, the Courts rarely find evidence of any accommodation by the Union or the employer whatsoever. Furthermore, it is usually found that the employee was willing to contribute the same amount as the dues to a charity to be named by the union or the employer. With no attempt to accommodate by the union or the employer, the Courts have quickly found that a violation of Section 701(j) has occurred. These cases include: McDaniel vs. Essex International, Inc., 696 F. 2d 34 (6th Cir. 1982); Nottelson vs. Smith Steelworkers, 643 F. 2d 445 (7th

Cir. 1981), Yott vs. North American Rockwell Corp., 602 F. 2d 904 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980); Burns vs. Southern Pacific Trans. Co.; 589 F. 2d 403 (9th Cir. 1978), cert. denied, 99 S.Ct. 843 (1979); Tolley vs. Martin-Marietta Corp., 648 F. 2d 1239 (9th Cir. 1981); Anderson vs. General Dynamics Convair Aerospace Division, 589 F. 2d 397 (9th Cir. 1978).

Petitioner has cited several of these cases as a basis for her conclusion that a conflict exists between the circuits. The cases cited above are factually distinguishable from Jordan and the case

sub judice: there will rarely exist any hardship on an employer or a union which would excuse an accommodation falling in the first category. By definition, therefore, a union dues situation will not involve actual evidence of such hardship and may become at some point a per se violation of Section 701(j). The instant case however, involves a refusal to work, which falls in the second category, which as is discussed below, is a different situation altogether. The problems inherent with a refusal to work case are not present in a union dues case, and the results oftentimes sharply differ between the two

types of cases.

The second category, i.e. refusal to work at certain times in conflict with religious beliefs, oftentimes presents the court with a much harder question involving undue hardship to the employer. Our case falls into this category as does Hardison. In these cases, the court often finds that the employer has attempted to accommodate the employee and the results usually depend on the factual determination of whether the employer would have to incur "more than a de minimis cost" as stated in Hardison.

In Ward vs. Allegheny Ludlum Steel Corp., 560 F. 2d 579 (3d Cir. 1977), plaintiff contended that the employer could use substitutes to replace him while he was absent from work. Pursuant to Hardison, the court remanded the case to the district court for a factual determination of whether the necessity of overtime pay for substitutes would constitute undue hardship for the employer. Compare, Neiderhuber and Brown, infra.

In Neiderhuber vs. Camden County Vocational Tech. School, 495 F. Supp. 273 (D.N.J.) aff'd without opinion, 671 F. 2d 496 (3d Cir.

1980), the plaintiff requested that he be allowed to miss occassional days of school in order to observe religious holidays (5-10 days a year). The court found that ample substitute teachers were available at no extra cost to the school system and therefore no undue hardship was present.

In Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977) (discussed above), the court found that plaintiff preempted defendant Bank from any attempts to accommodate her religious beliefs by refusing to work for Bank at all unless a blanket guar-

antee was given that she would not have to work on Saturdays.

Petitioner cites Cummins vs. Parker Seal Co., 516 F. 2d 544 (6th Cir. 1975) affirmed by equally divided court, 429 U.S. 65 (1976) for her contention that a conflict exists between the circuits. Respondent notes that this is a pre-Hardison case construing EEOC Reg. 29 C.F.R. §1605.1 (1974). Hardison noted the problems the courts were having with construing "undue hardship", including the Sixth Circuit. Hardison 432 U.S. at 75, note 10 (citing Cummins). Respondent contends that this pro-

blem was resolved by the Hardison decision. However, the Cummins court did find that the sole evidence of some complaints by other employees did not constitute "undue hardship" on the employer.

Petitioner also cites Draper vs. United States Pipe and Foundry Co., 527 F. 2d 515 (6th Cir. 1975), for the proposition that a conflict exists after Hardison. Again, Respondent notes that Draper and Cummins were resolved by the Hardison opinion. Hardison, 432 U.S. at 75, note 10.

Petitioner further cites Redmond

vs. GAF Corp., 574 F. 2d 897 (7th Cir. 1978) for the proposition that an employer must prove actual "undue hardship" and therefore conflicts with the Fourth Circuit. This is an incorrect reading of that case. The Court found that the employer failed to make any accommodation of the employee's request not to work. Id. at 903. It further noted that although the trial court did not have the benefit of the guidelines of Hardison, the record did not disclose that its finding of no "undue hardship" was "clearly erroneous". The court clearly applied the Hardison guidelines in exactly the same fashion as the trial court

in the instant case and Respondent submits that these circuits are in accord.

Petitioner cites Brown vs. General Motors Corporation 601 F. 2d 956 (8th Cir. 1979) for the proposition that the Fourth and the Eighth Circuits conflict on the de minimis issue. In that case the district court found that

> "sufficient members of substantially qualitied workers were available without any additional costs in wages or overtime."

601 F. 2d at 959.

The district court further found

that there was no lost efficiency nor were there any conflicts with the company's collective bargaining agreement. Hence, the Eighth Circuit quite properly reversed the District Court's finding of "more than de minimis cost". Tne court circuit went on to say that where, as in that case, the employer attempts accommodation and finds no additional costs, theoretical evidence will not suffice to prove undue hardship. Citing Draper, supra, the court stated:

> [w]e are somewhat sceptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice. The employer is on

> stronger ground when he has attempted various methods of accommodation and can point to hardship that actually resulted. (Emphasis Added)

601 F. 2d at 960. Respondent submits that it has achieved the "stronger ground" as was specifically found by the trial court below. The only difference between this case and Brown therefore, is a factual one.

While the petitioner failed to cite any "refusal to work" cases for the Ninth Circuit, Bhatia vs. Chevron U.S.A., Inc. 734 F. 2d 1382 (9th Cir. 1984) indicates that the Ninth Circuit follows the same standards as the Fourth Circuit in

analyzing "undue hardship". In that case, plaintiff refused to shave facial hair for religious reasons. His job required that he wear a gas mask with a proper seal which required the employee to be clean shaven. Not to wear such a mask would result in potential employer liability under the California Occupational Safety and Health Act. The employer attempted to find plaintiff another job and offered him four different positions at similar pay. The plaintiff rejected these accommodations. The court stated:

> Chevron has established that if it were to retain Bhatia as

> a machinist and assign him to duties involving exposure to toxic gas, it would risk liability for violating California Occupational Safety and Health Administration standards. If, on the other hand, it retained him as a machinist and directed his supervisors to assign Bhatia to only such duties as involved no exposure to toxic gas, the burden would be twofold. First, Chevron would have to revamp its currently unpredictable system of duty assignments to accommodate the need for predicting whether particular assignments involved potential exposure to toxic gases. Second, Bhatia's co-workers would be required to assume his share of potentially hazardous work. Title VII does not require Chevron to go so far.

Id at p. 1384.

Finally, Petitioner asserts that the District of Columbia and the Fourth Circuits are in conflict, citing Haring vs. Blumenthal, 471 F.

Supp. 1172 (D.D.C. 1979), cert. denied 452 U.S. 939 (1981), reh. denied 453 U.S. 927 (1981). This is not exactly a "refusal to work" case. Plaintiff was an IRS employee who refused to work on certain cases, e.g. tax-exemption determinations because of his religious beliefs. The IRS proposed several "public policy" defenses to his religious discrimination suit which the Court found not to be evidence of any undue hardship. The only relevant assertion made by the IRS was the assumption that, should the IRS accommodate the plaintiff's requests in one situation; "it may well be that undue difficulties will

arise if others were to assert the same or similar rights". Id at p. 1181. The court apparently took the same approach as that taken in Brown, supra and in Niederhuber, supra and found no evidence of accommodation or of undue hardship. At any rate, Haring is factually distinguishable from our case. In the case sub judice the district court found evidence of present undue hardship, as that term was discussed in Haring, at p 1182. Simply put, the only difference between Haring and this case is the evidence presented at trial.

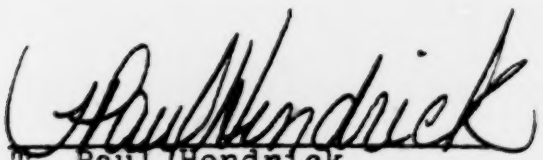
In summary, each case under

Section 701(j) of Title VII of the Civil Rights Act turns on its own set of facts. Hardison, supra; Redmon, supra. It is clear that the Fourth Circuit follows precisely the same legal approach to these cases as the circuits cited by Petitioner. The conflict proposed by Petitioner is an illusory one, resulting from different factual situations. If the case below had been decided differently, Petitioner would more than likely agree that there is no conflict between the Circuits. In fact, the only complaint of Petitioner is the result of her lawsuit, not in the legal analysis that led to it.

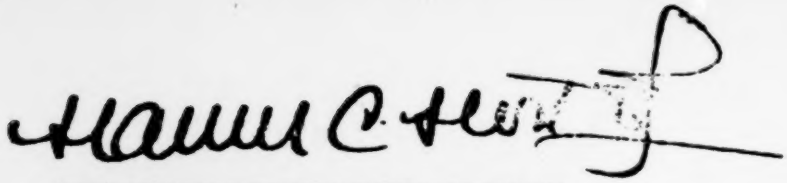
Conclusion

Based on the authorities and arguments set forth above, Respondent, Travelers Inns of North Wilkesboro, Inc. d/b/a Holiday Inn of Wilkesboro, respectfully prays that the Petition for Writ of Certiorari be denied.

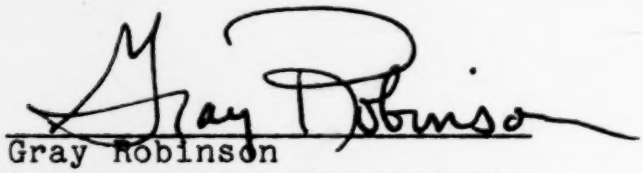
This 27th day of August, 1985.



T. Paul Hendrick



Hamilton C. Horton, Jr.



Gray Robinson
Attorneys for Respondent

OF COUNSEL:

HORTON, HENDRICK & KUMMER
450 NCNB Plaza
Winston-Salem, NC 27101
Telephone: (919) 723-1826

CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 27th day of August mailed the required copies of the Brief in Opposition to the Petition for Writ of Certiorari to the

Clerk's office of the Supreme Court of the United States for the purpose of filing the same on August 27, 1985 and have also mailed the required copies of the above-mentioned document to all attorneys of record as follows:

HARVEY L. KENNEDY
HAROLD L. KENNEDY, III
KENNEDY, KENNEDY, KENNEDY, AND KENNEDY
710 First Union Building
Winston-Salem, North Carolina 27101

T. Paul Hendrick
Attorney for Respondent